EUGENE V. VOGEL

IBLA 82-125 Decided June 30, 1982

Appeal from letter decision of Acting District Manager, Medford District Office, Bureau of Land Management, requiring certain stipulations as part of proposed right-of-way grant. OR 18527.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Conditions and Limitations

   In granting a right-of-way for a domestic water pipeline, pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1976), BLM properly may require stipulations providing that the right-of-way is not renewable and that the United States is not liable for damage or deterioration of the water supply. However, where the circumstances of a particular case indicate that a better course of action, and one that allows the balancing of the interests of BLM and the right-of-way applicant, is to allow the grant to be renewed, the Board may direct that the grant be renewable pursuant to 43 CFR 2803.6-5(a).

APPEARANCES: Eugene V. Vogel, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Eugene V. Vogel has appealed from a letter decision of the Acting District Manager, Medford District Office, Bureau of Land Management (BLM), dated October 15, 1981, requiring certain stipulations as part of a proposed right-of-way grant, OR 18527, for a domestic water pipeline to be issued for a term of 10 years, pursuant to section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C.

§ 1761(a) (1976). 1/ The pipeline would be located in lot 7, sec. 29, T. 38 S., R. 7 W., Willamette meridian, Josephine County, Oregon.

In Eugene V. Vogel, 52 IBLA 280 (1981), we reviewed an April 1979 BLM decision rejecting appellant's application for a right-of-way, in part, on the basis of the asserted conflict between BLM's timber management plan and appellant's pipeline. We ruled for appellant, noting that his pipeline would present little or no obstacle to BLM's planned roadbuilding or logging operations and that appellant had agreed to release BLM in writing from any liability for damage to his pipeline. We remanded the case to BLM for issuance of the right-of-way "with appropriate stipulations." Eugene V. Vogel, supra at 287. On remand BLM prepared a land report which stated that "the proposed action will present only minimal impact to our land use plans." The Acting District Manager's letter decision requiring execution of the stipulations followed.

In his statement of reasons for appeal, appellant objects to two stipulations, numbers three and ten. Stipulation number three provides: "This right-of-way is not renewable." (Emphasis in original.) Appellant contends that the right-of-way should either be unlimited as to time or longer in time and renewable because "I intend to live on this land the rest of my life and pass it on to my children." Stipulation number ten provides: "The United States does not guarantee the quantity, quality, or purity of the water used by the grantee. The United States will not be held liable for damage or deterioration of the water supply which may result from natural causes or activities of the United States." Appellant states: "I do not mind releasing the B.L.M. from liability due to natural causes, timber harvesting, or road building. However this stipulation would also release the B.L.M. from liability due to faulty application of pesticides or herbicides. I cannot agree to this."

Section 504(b) of FLPMA, 43 U.S.C. § 1764(b) (1976), provides that a right-of-way "shall be limited to a reasonable term in light of all circumstances concerning the project" and "shall specify whether it is or is not renewable." In addition, section 504(c) of FLPMA, 43 U.S.C. § 1764(c) (1976), provides that a right-of-way "shall be granted * * * under such regulations or stipulations, consistent with the provisions of this subchapter or any other applicable law." However, such stipulations must not be inconsistent with or tend unreasonably to burden the proposed right-of-way. Donald R. Clark, 56 IBLA 167 (1981), and cases cited therein.

BLM's management plan for this area, the Josephine Management Framework Plan (MFP), provides under WL-4.5 that a domestic water pipeline right-of-way will be approved only if certain criteria are met:

1/ Appellant's right-of-way would consist of 1-inch diameter underground plastic pipe running from a dam in the bed of a small spring tributary of the McMullin Creek and a collection pool at the edge of appellant's property.

1. the pipeline does not materially interefere with the management of commercial forest lands classified for high intensity or low intensity forest management;
2. the water flow to be diverted is surplus to the flow needed to sustain fish, wildlife, riparian vegetation, and outdoor recreation uses on the public lands;

3. the application recognizes the pre-emptive right of the BLM to manage other resources on the public lands;

4. provisions for reserving adequate water flow for fish, wildlife, livestock, riparian vegetation, and human use are made as a condition of the right-of-way grant;

5. the applicant acknowledges as a condition of the right-of-way grant that the Federal government does not guarantee nor is liable for the quality of the water, nor protection of the facilities from logging or road construction.

6. the permit term will not exceed ten years, to allow reevaluation of applicable criteria at that time.

It appears that the fifth and sixth criteria outlined in the Josephine MFP, under WL-4.5, were the basis for the disputed stipulations. The applicable statutory provision, 43 U.S.C. § 1764(b) (1976), clearly provides for reasonable limits on the term of the right-of-way and that the right-of-way may be nonrenewable. There is no basis for appellant's objection to the length of the proposed grant.

[1] The question of renewability must be examined more closely, however, with special attention given to the regulations at 43 CFR 2803.6-5. Subsection (a) of that regulation states that where a grant provides for renewal, the authorized officer is required to renew the grant if the authorized use is continuing and the right-of-way is being operated and maintained in accordance with the provisions of the grant and the regulations. The terms, conditions, and special stipulations of the grant, however, are subject to modification prior to renewal in order to reflect any new requirements imposed by current Federal and State land use plans, laws, regulations, or other management decisions.

Under 43 CFR 2803.6-5(b), if a grant does not provide for renewal, the holder, prior to expiration of the grant, may request renewal, and the grant may be renewed at the discretion of the authorized officer. Most importantly, 43 CFR 2803.6-5(d) provides that denial of any request for renewal under subsection (b) "shall be final with no right of review or appeal."

The preamble to the final rulemaking promulgating 43 CFR 2803.6-5 states with respect to the denial of the right of appeal:

> Several comments raised questions with regard to the denial of the right to appeal by paragraph (d) as it applies to renewals under paragraphs (b) and (c). In those instances where a grant issued under this rulemaking does not carry a right of renewal, the question of renewal was decided at the time the grant was issued, with the right to appeal the issue of non-renewability. This provision allows the authorized officer to look at any new circumstances that may have arisen since making the decision not to allow a renewal and to consider them. This is an extraordinary opportunity, one that would not ordinarily be available to the grant holder and should not be reviewable, as was the question of renewability at the time the grant was issued.

45 FR 44525 (July 1, 1980).

In this case the grant provides that the right-of-way is not renewable, therefore, review is appropriate at this time. As the preamble indicates, subsection (b) allows the authorized officer to reconsider whether to renew based on any "new circumstances."

We should examine the applicability of these regulatory provisions, in light of the preamble language, to this case. Appellant has been granted a pipeline right-of-way to divert water for domestic use. The grant is for 10 years, and BLM states that it is nonrenewable. Appellant objects. His stated intention is to remain on his land during his lifetime and pass the land on to his children. If appellant remains on the land and continues to utilize the right-of-way, we must assume that he will desire to have the right-of-way renewed at the end of the term. Does the decision now not to grant renewal foreclose perpetuation of the right-of-way? According to an unsigned note in the case file dated November 20, 1981, it does not. The note state "BLM is not saying a new right-of-way grant will not be issued but only that it will be discretionary with the authorized officer based on the situation existing at that time and will not be an automatic renewal." (Emphasis in original.)

The preamble to the final regulations indicates that where renewal has been denied in the grant the authorized officer may look at "new circumstances" to determine if renewal should be made. In addition, the preamble characterizes this as an "extraordinary opportunity."

Assuming in this case that at the end of the term appellant has complied with the terms and conditions of the right-of-way grant, BLM has no new plans for the lands involved, and appellant still desires the right-of-way, what are the new circumstances for consideration by the authorized officer? There are none. The authorized officer could exercise his discretion and deny a request for renewal. What recourse would appellant have? He has come to depend on the water supply, yet the regulations preclude any administrative review or appeal. To quote from the regulatory preamble, the authorized officer could justify

denial by stating that "the question of renewal was decided at the time the grant was issued." 2/

This example points out why the renewal provision in the original grant is so important and why its implications must be closely scrutinized.

We believe, having reviewed the record in this case, that fairness requires that stipulation number 3 be changed to provide for renewal of the grant pursuant to 43 CFR 2803.6-5(a). This conclusion is consistent with criterion 6 in the Josephine MFP, WL-4.5. That criterion provides for a term not to exceed 10 years "to allow reevaluation of applicable criteria at that time." Provision for renewal does not preclude reevaluation. In fact, 43 CFR 2803.6-5(a) specifically provides for modification of the grant when necessary. This authority to modify allows BLM to insure compatibility with its land management practices. In addition, should appellant fail to comply with the terms or conditions of the grant BLM temporarily may suspend the right-of-way pursuant to 43 CFR 2803.3 or act in accordance with 43 CFR 2803.4 to suspend or terminate the right-of-way. Thus, renewal pursuant to 43 CFR 2803.6-5(a) provides protection for those concerns represented by BLM.

Likewise, provision for renewal protects appellant. If he is continuing to use the right-of-way for the purposes authorized in the original grant, and it is being operated and maintained in accordance with all the provisions of the grant and pursuant to the regulations, the grant should be renewed, subject to BLM's right to modify.

To allow the stipulation of nonrenewal to stand in this case would be to subject appellant to possible nonreviewable action by BLM in the future. The record indicates that such a choice is not the best one in the case. The better course, and one that balances the interests of BLM and appellant, is to require that the grant be renewable pursuant to 43 CFR 2803.6-5(a).

Turning to appellant's objection to stipulation number 10 relating to limitation of liability for damage or deterioration of the water supply, we find no basis for requiring any change of that stipulation. While appellant's concern relates to the use of pesticides and herbicides, appellant has chosen to seek a water source on public lands with the knowledge that the Department has approved the spraying of such substances in other areas. In this case appellant will have the full benefit of the right-of-way, but in the unlikely event that the water supply is damaged or deteriorates, the United States is protected from liability. We find no legal impediment to imposition of this stipulation.

2/ Theoretically, appellant also could apply for a new right-of-way. However, what would the chances of approval be if the authorized officer has denied renewal?

Therefore, we modify BLM's letter decision to require that the grant indicate that it is renewable. BLM may properly require stipulation number 10 as part of appellant's proposed right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge